36034-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LESLIE LEE PITTMAN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. APPELLANT'S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 5

A. THIS COURT MAY NOT OVERRULE THE SUPREME COURT'S PRIOR DECISIONS..... 5

B. ANY ERROR IN THE DEFENDANT'S SENTENCE IS MOOTED BY THE FACT HE HAS SERVED HIS SENTENCE, IS NOT ON SUPERVISION, AND WAS RELEASED THE DAY OF SENTENCING. 7

C. THE TRIAL COURT DID NOT SENTENCE THE DEFENDANT OUTSIDE OF THE STANDARD RANGE. DEFENDANT STIPULATED HIS OFFENDER SCORE WAS "8" AND SIGNED A STIPULATION ESTABLISHING WHICH CONVICTIONS WERE COUNTABLE AS CRIMINAL HISTORY. 8

Mr. Pittman has not established ineffective assistance of counsel. Because any showing of error requires a better record than we have here, his remedy is to bring a personal restraint petition wherein he can muster his evidence and argument. 12

D. THE STATE PROVIDED PROOF OF THE COMPARABILITY OF THE OUT-OF-STATE CONVICTIONS. 16

1. Texas law and pleas. 16

2. Mr. Pittman's 2009 and 2007 Texas convictions for unauthorized use of a vehicle..... 19

3. 2008 credit card fraud. 22

4. Third degree assault conviction. 24

5. 1996 Texas forgery 26

6. Possession of a controlled substance conviction. 27

E. THE STATE AGREES THAT THIS COURT SHOULD ORDER THE CRIMINAL FILING FEE TO BE STRICKEN PURSUANT TO *RAMIREZ*. 28

V. CONCLUSION 29

TABLE OF AUTHORITIES

Washington Cases

City of Kennewick v. Day, 142 Wn.2d 1, 11 P.3d 304 (2000) 6

Douglas NW, Inc. v. Bill O' Brien & Sons Const., Inc.,
64 Wn. App. 661, 828 P.2d 565 (1992) 17

In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)..... 10

In re Pers. Restraint of Lavery, 154 Wn.2d 249,
111 P.3d 837 (2005)..... 18, 19

In re Pers. Restraint of Mattson, 166 Wn.2d 730,
214 P.3d 141 (2009)..... 7, 8

Matter of Arnold, 198 Wn. App. 842, 396 P.3d 375 (2017),
review granted, 189 Wn.2d 1023 (2017), *and rev'd*,
190 Wn.2d 136 (2018) 5, 7

Menefee v. State, 287 S.W.3d 9 (Tex. Crim. App. 2009) 16, 18

State v. Argo, 81 Wn. App. 552, 915 P.2d 1103 (1996) 19

State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007),
as amended (Nov. 27, 2007)..... 9

State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004)..... 6

State v. Christian, 200 Wn. App. 861, 403 P.3d 925 (2017) 23

State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981)..... 6, 7

State v. Deer, 175 Wn.2d 725, 287 P.3d 539 (2012) 6

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 8

State v. Garrison, 2018 WL 1801961 (Wash. Ct. App.
Apr. 16, 2018), *review denied*, 191 Wn.2d 1015 (2018) 18

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995)..... 7

State v. Harris, 4 Wn. App. 2d 506, 422 P.3d 482 (2018) 9

State v. Hubbard, 106 Wn. App. 149, 22 P.3d 296 (2001)..... 17

State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012)..... 7, 8, 21, 24

State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) 19

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002) 15

State v. Melton, 63 Wn. App. 63, 817 P.2d 413 (1991)..... 17

State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009) 9, 14

State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970) 17

State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998)..... 18, 19

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 28

State v. Ramos, 171 Wn.2d 46, 246 P.3d 811 (2011) 29

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004)..... 14

State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007)..... 12

State v. Wilson, 170 Wn.2d 682, 244 P.3d 950 (2010)..... 10, 14

State v. Yallup, 3 Wn. App. 2d 546, 416 P.3d 1250,
review denied, 191 Wn.2d 1014 (2018)..... 15, 30

State v. Zamudio, 192 Wn. App. 503, 368 P.3d 222 (2016)..... 14

Federal Cases

Schad v. Arizona, 501 U.S. 624, 111 S.Ct 2491,
115 L.Ed.2d 555 (1991)..... 6

Statutes

Laws of 2018, ch. 269, § 17 28

Laws of 2018, ch. 269, § 18 29

Laws of 2018, pg. ii 28

RCW 9.35.020 ..... 22, 23

RCW 9A.36.031 25

RCW 36.18.020 28

RCW 43.43.754 28

RCW 43.43.7541 29

RCW 69.50.4013 2

Tex. Crim. Proc. Code Ann. § 1.15 ..... 16, 18, 20, 22

Texas Penal Code 22.01 24

Texas Penal Code 32.31 22

Rules

CrR 4.2 17

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Interpreting possession of a controlled substance as a strict liability offense and requiring the defendant to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law.

2. The trial court erred by holding that defendant's agreement in a prior 2014 Washington case that his prior Texas convictions were correct and comparable was evidence the court could rely on in the instant case.

3. The trial court erred in finding prior Texas convictions as comparable, and the defendant's attorney was ineffective for affirmatively agreeing, along with the defendant, that four of his prior Texas convictions were comparable to Washington State felonies.

4. The filing fee and DNA fee should be stricken from the defendant's judgment and sentence.

II. ISSUES PRESENTED

1. Should this Court reverse the Supreme Court and find that the lack of a requirement that the State prove knowledge to convict in a possession of a controlled substance charge unconstitutionally shifts the burden of persuasion, and, also, violates due process?

2. Did the trial court err by using the defendant's 2014 stipulation to comparability of the same Texas offenses in a different case as evidence of comparability in the instant 2016 case?

3. Did the trial court err by accepting defendant's stipulation that he had an offender score of "8," which placed him in the sentencing range to which he was sentenced?

4. Should the filing fee and DNA fee be stricken from the defendant's judgment and sentence?

III. STATEMENT OF THE CASE

Mr. Pittman was searched incident to his arrest for a possession of a stolen motor vehicle. RP 304; CP 1. Police recovered a piece of folded aluminum foil and paper from Mr. Pittman's pants' pocket. RP 292. The foil package contained methamphetamine. RP 337-40. Mr. Pittman denied knowing he possessed methamphetamine in his pocket. RP 375. Mr. Pittman admitted to the arresting officer he had smoked methamphetamine a few hours earlier in the day. RP 404.

The sentencing range for possession of methamphetamine is set forth below.[1] RCW 69.50.4013(1).

SENTENCE RANGE – DRUG

Offender score

	0 to 2	3 to 5	6 to 9+
Level I	**3m 0-6**	**9m 6+-12**	**18m 12+- 24**

[1] Washington State Adult Sentencing Guidelines Manual, Ver. 2016, page 350.

At sentencing, the defendant agreed that his offender score was an "8." In fact, both the defendant, Mr. Pittman, and his attorney, Michael Vander Giessen, as well as the prosecutor signed the Understanding of Defendant's Criminal History, CP 352-53[2] (attached hereto as Attach. A), and Mr. Pittman *also* initialed section 1.5 of that document, stating:

> Defendant's understanding and agreement that his/her criminal conviction history is set forth above in this document. **Defendant affirmatively agrees that the State has proven, by a preponderance of the evidence, defendant's prior convictions and stipulates, without objection, by his/her signature below, unless a specific objection is otherwise stated in writing within this document** - UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY, each of the listed criminal convictions contained within this document count in the computation of the offender score and sentencing range and that any out-of-state or foreign conviction(s) is the equivalent of a Washington State criminal felony offense and conviction for the purposes of computation of the resultant offender score and sentencing range. The defendant further stipulates and agrees he/she has read or has had the contents of the document read to him/her and he/she understands and agrees with the entirety of the contents of this document. (DEFENDANT'S INITIALS)
> *(L.P.)*

CP 353 (emphasis added). In doing so, Mr. Pittman and his attorney agreed he had an offender score of "8." However, the trial court found that his

[2] A supplemental designation of clerk's papers is being filed contemporaneously herewith. The understanding of defendant's criminal history is estimated to be CP 352-53; the DOC disposition report is estimated to be 354-56.

offender score was a "9,"[3] and sentenced him to a 23-month *standard range* sentence for an offender *within the 6-9 offender score range*.[4]

At sentencing, the trial court informed Mr. Pittman that it had spoken with jail staff to ensure that Mr. Pittman would receive credit for time served in an amount that would release him from jail the day of sentencing:

> THE COURT: Well, Mr. Pittman, I'm going to follow their recommendation. I'm going to grant you the 541 days credit, but I am going to sentence you to the 23 months. I did it one month less only because I think with the 541 with good time, you'll get out today. I'm guessing with 24 months, you would have gotten out today, but that will just make sure that you get it. So you got 23 months in custody, credit for 541 days. I do have to put you on community custody for 12 months.
>
> …
>
> THE DEFENDANT: From what I've heard, and I'm just saying this because I want to reiterate the situation from what I've heard if we're sentenced for 12 plus, we have to go to Shelton?
>
> THE COURT: No. I talked to the jail last week. I actually verified it. She said if it's going to be a credit for time served and DOC will come and review it, they are not going to send you. She said they can basically do it here.
>
> THE DEFENDANT: Okay.

[3] CP 323.

[4] CP 325.

> THE COURT: I verified that through Jonnie Eaton in the jail who actually looked at your file and said that they would if you get even the maximum, they will calculate it here. I asked her because you both had different statements, and I was kind of curious on whether or not that would work.
>
> THE DEFENDANT: So credit for time served released today or?
>
> THE COURT: It's 23 months. Then they're going to figure out your good time. Then they'll apply your 541 days, and that comes out to about I calculated a year and almost six months, and with good time, that's why I put you down to 23 months because that should get you out today.
>
> THE DEFENDANT: Yes, ma'am. Thank you.

RP 496-98.

Mr. Pittman served his sentence and is no longer on Department of Corrections Supervision. CP 354-57.

IV. ARGUMENT

A. THIS COURT MAY NOT OVERRULE THE SUPREME COURT'S PRIOR DECISIONS.

The principle of stare decisis dictates that the superior court and this Court are bound by our State Supreme Court precedent; "[a]dherence is mandatory, regardless of the merits of the higher court's decision." *Matter of Arnold*, 198 Wn. App. 842, 846, 396 P.3d 375 (2017), *review granted*, 189 Wn.2d 1023 (2017), *and rev'd on other grounds*, 190 Wn.2d 136 (2018).

Possession of a controlled substance is a strict liability crime having no mens rea element. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004); *City of Kennewick v. Day*, 142 Wn.2d 1, 9, 11 P.3d 304 (2000). The State must prove the fact of possession and the nature of the substance. *Bradshaw*, 152 Wn.2d at 538. A defendant may avoid conviction by establishing unwitting possession by a preponderance of the evidence. *Id*. at 531, 533-34.

Mr. Pittman asserts that the affirmative defense shifts the burden of proof in violation of due process. Our Supreme Court has repeatedly upheld the legislature's authority to enact strict liability crimes. *Bradshaw*, 152 Wn.2d at 532-34; *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981); *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). Nonetheless, Mr. Pittman relies on *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct 2491, 115 L.Ed.2d 555 (1991), which did not involve strict liability, to suggest that the possession statute is unconstitutional for imposing strict liability where other states do not. Brief of Appellant at 11-12. *Bradshaw* and *Cleppe* reviewed the language and legislative history of the possession statute and determined that the legislature clearly intended the statute to be a strict liability crime. *Bradshaw*, 152 Wn.2d at 537. In *Cleppe*, our Supreme Court also noted that under the prior statute, the 1951 Uniform Narcotic Drug Act, neither intent nor guilty knowledge was a

required element of the crime of simple narcotic possession. 96 Wn.2d at 378.

This Court would have to overrule these authorities to find that strict liability was unconstitutional. This it cannot do. *Matter of Arnold*, 190 Wn.2d 136

B. ANY ERROR IN THE DEFENDANT'S SENTENCE IS MOOTED BY THE FACT HE HAS SERVED HIS SENTENCE, IS NOT ON SUPERVISION, AND WAS RELEASED THE DAY OF SENTENCING.

Mr. Pittman argues the State must prove his criminal history every time he is sentenced. For the purposes of this appeal, the State agrees with this proposition.[5] However, because Mr. Pittman was released on the day of sentencing and is not on any sentencing conditions[6] related to his sentencing range, the standard range sentence calculations are moot.

As a general rule, reviewing courts do not consider questions that are moot. *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995); *see also State v. Hunley*, 175 Wn.2d 901, 906, 287 P.3d 584 (2012) (case is technically moot if the court can no longer provide effective relief), *see In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 736, 214 P.3d 141 (2009)

[5] The issue of what types of proof may be admissible at a sentencing hearing is a different question.

[6] All that remains of this sentence are the financial conditions; he is no longer under supervision. CP 354-57.

(same). However, the court may retain and decide an appeal if it involves matters of continuing and substantial public interest.[7] There is no matter of continuing and substantial public interest presented in this matter.

Ironically, the *only* current possibility of Mr. Pittman serving further jail time on this case is if he prevails on obtaining the useless resentencing he now requests and then fails to appear or respond to the summons setting such court date, resulting in the issuance of a warrant for his arrest.

C. THE TRIAL COURT DID NOT SENTENCE THE DEFENDANT OUTSIDE OF THE STANDARD RANGE. DEFENDANT STIPULATED HIS OFFENDER SCORE WAS "8" AND SIGNED A STIPULATION ESTABLISHING WHICH CONVICTIONS WERE COUNTABLE AS CRIMINAL HISTORY.

When calculating an offender score, the State has the burden of proving that prior convictions have not washed out. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). The State also has the burden to prove the existence of prior convictions at sentencing by a preponderance of the evidence. *Hunley*, 175 Wn.2d at 909-10. When a defendant *affirmatively* acknowledges at the sentencing hearing that the State's criminal history and offender score calculations are correct, nothing more

[7] *In re Mattson*, 166 Wn.2d at 736 (setting forth factors to consider; (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question do not warrant review of this case).

is necessary, and the proof requirement is met. *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007), *as amended* (Nov. 27, 2007). However, the Supreme Court has emphasized "the need for an affirmative acknowledgment by the defendant of facts and information introduced for the purposes of sentencing" before the State will be excused from its burden of proving criminal history. *State v. Mendoza*, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009), *disapproved of on other grounds by State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014); *cf. State v. Harris*, 4 Wn. App. 2d 506, 513, 422 P.3d 482 (2018) (court holding right to appeal may be expressly waived: "Moreover, Harris does not address his signed waiver. He makes no argument that under the law or the facts of this case, he should not be bound by his express waiver. Because the right to appeal may be waived, Harris signed a valid waiver and Harris makes no attempt to explain why we should not adhere to the waiver, we do not review his arguments").

Mr. Pittman (and his attorney) affirmatively agreed and stipulated that eight of his prior felony convictions should be included in his present criminal history. CP 352-53. This stipulation was signed by Mr. Pittman, his attorney, and the prosecutor. CP 353. Mr. Pittman also initialed his understanding of criminal history, agreeing that it was accurate at the time of sentencing (other than where he noted his objections). *Id*. He agreed "his conviction history [was] set forth above in this document." He also

affirmatively agreed that the State proved, by a preponderance of the evidence, his prior convictions. *Id*.

His stipulation specifically included six out-of-state Texas offenses. CP 352, #3 - #8. His stipulation affirmatively agreed that each of these out-of-state convictions were "equivalent to a Washington State criminal felony offense and conviction for the purposes of computation of the resultant offender score and sentencing range." CP 353. Remarkably, the defendant noted objections to the specific felonies (and misdemeanors) that he did not agree were comparable. CP 352. Now, Mr. Pittman (or more likely his appellate attorney) wishes to undo his doing. But, his affirmative acknowledgement of an offender score of "8" should constitute a waiver of his sentencing complaint because he agreed he was an "8," and he was sentenced within the standard range for an anyone having an offender score of "6-9" for this offense.

Where an alleged sentencing error "involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion," the error may not be raised for the first time on appeal. *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002); *State v. Wilson*, 170 Wn.2d 682, 689, 244 P.3d 950 (2010). The defendant cannot now claim for the first time on appeal that the understanding of his criminal history was inaccurate; that claim has been waived by his agreement to the contents

of the document reflecting his criminal history. Mr. Pittman concedes the same:

> RCW 9.94A.530(2) permits the State to rely on information "admitted, acknowledged, or proved in a trial or at the time of sentencing" to determine a sentence. The plain language of the statute refers to admissions or acknowledgements at the time of the instant sentencing, not in previous unrelated sentencing proceedings. Therefore, the State may not rely on a defendant's admission or acknowledgment in a previous sentencing proceeding to establish the conviction in a current sentencing proceeding.

Br. of Appellant at 20.

This concession by the appellant was made because he neglected to discover or include in the clerk's papers the defendant's *signed* agreement as to his criminal history that was submitted at sentencing *in the present case*.[8] That renders the issue of whether a trial court may rely on *prior* averments signed by the defendant moot.[9] It matters not whether defendant

[8] This is the most likely inference from the defendant's failure to include the signed and dated Understanding of Defendant's Criminal History in the Clerk's Papers in instant case. This oversight has now been cured by the State's inclusion of this relevant document in the Clerk's Papers. CP 352-53.

[9] Mr. Pittman complains about the trial court's use of his Understanding of Criminal History from his 2014 case. The State acknowledges that the defendant's silence as to criminal history is not considered an acquiescence to such history, and that the defendant may object to the offenses he agreed to in a prior case as being criminal history in the present case, but the issue of the *evidentiary* use of such a signed acknowledgement or admission may be an issue warranting further discussion in a case where it matters because it actually affected the sentencing. However, this is not that case.

has an offender score of "6" or "10" in the instant case, where he received a standard range sentence, because, as above, the standard range sentence is identical under those offender scores. The trial court was entitled to consider defendant's written agreement, made with advice of counsel after counsel reviewed and considered the Texas sentencing documents.

> Mr. Pittman has not established ineffective assistance of counsel. Because any showing of error requires a better record than we have here, his remedy is to bring a personal restraint petition wherein he can muster his evidence and argument.

Relying on *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007), Mr. Pittman suggests that if defense counsel waived comparability, he was denied effective assistance of counsel. Br. of Appellant at 31-47. In *Thiefault*, defense counsel failed to object to the sentencing court's erroneous determination that the defendant's Montana conviction was legally comparable. Our State Supreme Court determined that defense counsel's failure to object was deficient performance and that the deficient performance was prejudicial under the circumstances because the record contained insufficient documentation to establish whether the conviction was factually comparable. The court then remanded the case for a determination of factual comparability. *Id*. at 416-17.

Unlike *Thiefault*, the sentencing court in this case was not required to undertake a comparability analysis because Mr. Pittman and defense

counsel *expressly acknowledged* the accuracy of eight of the defendant's prior felonies, including six from Texas. This acknowledgement was discussed by the parties prior to sentencing, and was explained to the trial court at the time of sentencing:

> MR. MCCOLLUM [prosecutor]: Mr. Vander Giessen is withdrawing his objection to the 2008 conviction for credit card abuse, to the 1999 -- or rather 2000 conviction for third degree assault, to the 1996 conviction forgery, the 1992 conviction of dangerous drugs and the 1991 conviction of theft property, the 1991 conviction of failure to stop or render aid. I believe Mr. Vander Giessen had initially conceded that was comparable to Washington's laws.

RP 487.

> MR. VANDER GIESSEN [defense attorney]: Thank you, Your Honor. Mr. Pittman stipulates and has signed the document stipulating to an offender score of eight. The only remaining dispute that has to do the with the unauthorized use of motor vehicle. I rely on my briefing in regard to that.

RP 489.

Moreover, the record shows that defense counsel received certified copies of the Texas proceedings before sentencing and reviewed those convictions prior to sentencing, and after doing so, agreed that the eight convictions were valid. CP 173-218, 225-319. The record is not clear as to what documents related to the Texas convictions the defendant's trial attorney possessed and was able to review prior to making the stipulation. Only the documents provided in the State's memorandum have been

included in the appellant's designated clerk's papers. Therefore, a claim of ineffective assistance based upon the trial counsel's stipulation to the offender score fails. Mr. Pittman's ineffective assistance of counsel claim is based upon his ability to show that a sentencing error was *actually* made, and not merely that one might have been made. *See State v. Ross*, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004) (holding that "[t]o invoke the waiver analysis set forth in *Goodwin*, a defendant must first show on appeal ... that an error of fact or law exists within the four corners of his judgment and sentence"); *Mendoza*, 165 Wn.2d at 927-28 (requiring the defendant to show an obvious error of fact or law within the four corners of the sentence); *cf. Wilson*, 170 Wn.2d at 690 n.4 (indicating that the defendant is required to establish that an error in fact occurred, regardless of whether that error is apparent from the face of the judgment and sentence); *cf. State v. Zamudio*, 192 Wn. App. 503, 508-10, 368 P.3d 222 (2016) (discussing *Goodwin, Ross, and Mendoza*).

Nothing in the record supports an inference that defense counsel's agreement that his Texas convictions were factually comparable to Washington offenses was based upon an erroneous or inadequate review of the Texas convictions. Consequently, unlike the situation in *Thiefault*, Mr. Pittman has failed to make any showing that would overcome the strong

presumption that defense counsel's representation was effective and competent. *See State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Finally, Mr. Pittman fails to establish that he was prejudiced by the error. His sentence contemplated that he would be released from custody the day of the sentencing. If his offender score was but a "2," he would not have been released earlier. As this Court noted in *State v. Yallup*, 3 Wn. App. 2d 546, 558-59, 416 P.3d 1250, *review denied*, 191 Wn.2d 1014 (2018):

> We need only address the prejudice question. Typically, when counsel is alleged to have failed to file an appropriate motion or lodge a proper objection, a defendant must establish that he would have prevailed in the trial court in order to show that he was prejudiced by counsel's failure to act. *McFarland*, 127 Wn.2d at 333-34, 899 P.2d 1251. Mr. Yallup cannot meet that burden in this appeal because the necessary evidence is not in the record. Without having the federal court information, it is not possible to determine whether the trial court (and the PSI writer) incorrectly classified the offense. Without establishing prejudice, Mr. Yallup cannot show that his counsel performed ineffectively.

If there was any sentencing error attributable to the defendant's attorney in stipulating to his offender score of "8," the defendant has suffered no prejudice from that claim.

D. THE STATE PROVIDED PROOF OF THE COMPARABILITY OF THE OUT-OF-STATE CONVICTIONS.

1. Texas law and pleas.

Citing Tex. Crim. Proc. Code § 1.15 and *Menefee v. State*, 287 S.W.3d 9, 14 (Tex. Crim. App. 2009), Mr. Pittman argues the defendant is not required to admit to the facts contained in the information when entering a plea of guilty, and therefore, there are no facts attributable to a plea of guilty. He misses the point that, although not constitutionally required, the *Texas Court must find a factual basis* supporting the plea before entering a judgment of guilty.

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause.

Tex. Crim. Proc. Code Ann. § 1.15

The same is true in Washington. *See* CrR 4.2. Pleas "(d) … The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." *And see State v. Hubbard*, 106 Wn. App. 149, 155, 22 P.3d 296 (2001) (regarding the entry of an *Alford* Plea):

> Equivocal pleas should not be accepted by the court when the only factual basis for the plea is the defendant's own inconsistent statement. *State v. Iredale*, 16 Wn. App. 53, 57, 61, 553 P.2d 1112 (1976) (State made no offer of proof on defendant's guilt, only factual basis was defendant's equivocal statement.)
>
> But not all equivocal pleas raise this concern. When a defendant's equivocal factual statement is part of an *Alford* plea and there is an independent factual basis for the guilty plea, there is no reason to refuse the plea. *Montoya*, 109 Wn.2d at 280-81, 744 P.2d 340; *State v. Newton*, 87 Wn.2d 363, 370-71, 552 P.2d 682 (1976); *State v. Norval*, 35 Wn. App. 775, 782, 669 P.2d 1264 (1983).

It is apparent that Texas, like Washington, requires a factual basis to be found by the trial court before accepting a plea of guilty. Therefore, it is presumed that there were facts supporting the plea when a trial court entered the plea in either state.[10] Unless there are no factual averments contained

[10] Trial courts are also presumed to know the law. *See State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970); *Douglas NW, Inc. v. Bill O' Brien & Sons Const., Inc.*, 64 Wn. App. 661, 681, 828 P.2d 565 (1992); *State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991).

in the court records that could provide factual support for the presumptively valid plea, the plea as charged is valid.[11]

The State provided proof of Mr. Pittman's prior Texas convictions. The State will address each in the order raised by the defendant.

To compare offenses, the court utilizes a two-part test. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the court analyzes legal comparability by comparing the elements of the out-of-state offense to the most comparable Washington offense. *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). When the crimes' elements

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[11] Mr. Pittman's citation to thr court's unpublished decision in *State v. Garrison*, 75885-3-I, 2018 WL 1801961 (Wash. Ct. App. Apr. 16, 2018), *review denied*, 191 Wn.2d 1015 (2018), adds little in regard to the above analysis because that case involved the use of a Texas crime to impose a *life sentence as a persistent offender*, where the Texas crime had *a lesser mens rea* than that required for a Washington first-degree manslaughter conviction. Moreover, the defendant did not plead guilty and admit guilt, but was convicted by a jury. Finally, the state provided no evidentiary documents. They provided *only* the charging document.

Additionally, the issue of whether the Texas procedural statute (Tex. Crim. Proc. Code § 1.15) even applies in our state begs a choice of laws question on whether our Washington State courts should apply Washington State procedural law or Texas procedural law regarding the evidentiary use of out-of-state *court certified* documents for the purpose of sentencing for *felonies committed in Washington State*. The non-constitutional nature of the Texas procedural law is admitted by the Texas courts. *See Menefee*, 287 S.W.3d at 13. It would appear that Washington State has the greater interest in determining what offenses and documents are admissible at a sentencing for a felony committed in our state under the Sentencing Reform Act.

are not the same, the offenses are not legally comparable. *Id*. at 606. If the crimes are legally comparable, the analysis ends here and the crime is included in the offender score.

Second, if the offenses are not legally comparable, the court analyzes factual comparability. *In re Lavery*, 154 Wn.2d at 255-57. Offenses are factually comparable when the defendant's conduct would have violated a Washington statute. *Morley*, 134 Wn.2d at 605-06.

2. Mr. Pittman's 2009 and 2007 Texas convictions for unauthorized use of a vehicle.

These felony convictions were contested by Mr. Pittman, so they are properly preserved for appeal. However, as above, even if these two convictions were not included in his offender score, he would have an agreed offender score of "8"[12] and would remain in the same sentencing range. Any error must be deemed harmless.[13]

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[12] The eight felonies he stipulated were countable in his offender score for the current offense.

[13] *Cf. State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996) ("Here, Argo concedes that the standard range would remain the same whether his offender score was 16 or 13. Thus, [*State v.*] *Brown*, [60 Wn. App. 60, 802 P.2d 803 (1990)] does not mandate remand in this case, and the error in the trial court's calculation of Argo's offender score was harmless"); *see also, State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003) ("Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing").

Mr. Pittman argues that the Texas statute for unauthorized use of a vehicle is broader than the Washington's because the Texas statute applies to boats and airplanes (motorized or not), as well as motor-propelled vehicles. The State agrees it is broader. However, each charging document in Mr. Pittman's case specifically alleged the vehicle taken was an automobile, and because, as pointed out by Mr. Pittman, the Texas trial court could not take the plea and enter judgment without finding facts supporting the guilt,[14] these two pleas and judgments support a preponderance finding that a motor vehicle was involved in each case. Additionally, within the 2007 plea statement, the defendant confesses and admits that each element of that charge (which necessarily includes the motor vehicle element) was committed. CP 223 (Stipulation and Judicial Confession). Also, the judgment entered is for unauthorized use of a motor vehicle. CP 271.

The court documents and the affidavits regarding the motor vehicle thefts provide further evidence of the non-rowboat nature of the motor vehicles; the 2009 vehicle was a maroon four-door Ford, CP 176-77; the 2007 vehicle taken was a 1988 Blue Ford Bronco, CP 273.

[14] Tex. Crim. Proc. Code Ann. § 1.15.

These court documents were provided to the Spokane County trial court, and may be used in the determination of factual comparability. *See State v. Hunley,* 175 Wn.2d at 910-12:

> "The best evidence of a prior conviction is a certified copy of the judgment." *Id*. at 480, 973 P.2d 452 [*State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)]. "However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *Id*.; *see, e.g., In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 570, 243 P.3d 540 (2010) (prior driving under the influence conviction proved by Department of Licensing driving record abstract and a defendant case history from the District and Municipal Court Information System (DISCIS); reasoning both are "official government records, based on information obtained directly from the courts, and can be created or modified only by government personnel following procedures established by statute or court rule"); *State v. Vickers*, 148 Wn.2d 91, 120-21, 59 P.3d 58 (2002) (prior conviction proved by certified copy of docket sheet showing guilty plea); *State v. Winings*, 126 Wn. App. 75, 91-93, 107 P.3d 141 (2005) (prior out of state convictions adequately proved with copies of minute orders, defendant's guilty pleas, charging documents identifying prior crimes and their elements, and certified abstract of judgment, taken together); *State v. Payne*, 117 Wn. App. 99, 105-06, 69 P.3d 889 (2003) (prior conviction from Canada proved when State introduced evidence of the warrant, information, sentence, transcript of defendant's plea and submissions, and warrant of committal).

(Footnote omitted.)

The trial court did not err by finding under the preponderance of the evidence standard that these two offenses were comparable and countable in defendant's offender score.

3. 2008 credit card fraud.

Mr. Pittman and his defense counsel expressly acknowledged the accuracy of this conviction. CP 352-53. Now, apparently reneging on his stipulation, Mr. Pittman argues that the Texas definition for credit card fraud is broader than the Washington State second degree possession of stolen property. It is. However, he makes no argument regarding the Texas crime's similarity to identity theft under RCW 9.35.020(1). That is the closest legal and factual Washington State statute to the Texas fraud charge.

Mr. Pittman plead guilty and was sentenced on October 10, 2008, to credit card abuse. Texas Penal Code 32.31. CP 277-78.[15] The information charged that he, on July 25, 2008, did "with the intent to fraudulently obtain benefit, use a card, namely, a Visa card, with knowledge that the card had not been issued to [him] and with knowledge that said card was not used with the effective consent of the card holder, namely Gabrielle Lamoreaux." This is the language contained in the information, and this is the "charging instrument" upon which Mr. Pittman entered a plea of guilty, as found by the Texas trial court. CP 277.

The above quoted language states an offense for Texas Penal Code 32.31(b)(8) "a person commits an offense if: … not being the

[15] Mr. Pittman again argues the defendant is not required to admit to the facts contained in the information based upon Tex. Crim. Proc. Code § 1.15.

cardholder, and without the effective consent of the cardholder, he possesses a credit card with the intent to use it." Br. of Appellant at 35. Likewise, under RCW 9.35.020(1) if a person "knowingly … possesses, [or] use[s] a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime" they are guilty of felony identity theft. A credit card is a means of financial information. *See State v. Christian*, 200 Wn. App. 861, 403 P.3d 925 (2017). In *Christian*, under facts similar to the instant case, the defendant's conviction for two counts of identity theft was upheld:

> The material facts are undisputed. Christian went to a Burlington Coat Factory retail store with a stolen debit card issued by U.S. Bank. According to bank records and testimony from a loss prevention officer of the store, Christian presented the stolen debit card to the store three times, in close succession. The bank authorized the first transaction for a $109.06 purchase. A second purchase for $213.39, which Christian attempted six minutes later, was declined by the bank. The bank also declined a third purchase for $113.39, which Christian attempted one minute later. It is also undisputed that the owner of the debit card did not authorize Christian to have it.

200 Wn. App. at 862-63.

The facts of Mr. Pittman's credit card abuse case are eerily similar. On July 25, 2008, Ms. Lamoreaux's purse was left unattended. CP 280 (affidavit of facts). The purse, her visa card, and other identification were taken. That same day, the Visa was used to purchase many items, yet, was

declined at some others. Mr. Pitman was identified on security video at Sears, where a purchase had been attempted. Mr. Pittman was arrested the day after the theft and credit use with the stolen credit card and other stolen identification in his pockets. Ms. Lamoreaux had not given Mr. Pittman permission to use the Visa. These documents, CP 277-84, were provided to the trial court, and may be used in the determination of factual comparability. *See State v. Hunley*, 175 Wn.2d at 910-12.

The Texas guilty plea and accompanying documents provide sufficient basis for the determination, by a preponderance of the evidence, that this credit card abuse offense was factually comparable to a Washington offense.

4. Third degree assault conviction.

At sentencing, Mr. Pittman and his attorney affirmatively agreed in writing that this offense was proven by the State by a preponderance of the evidence, was countable in his offender score, and that this conviction was "the equivalent of a Washington State criminal felony offense." CP 353.

On appeal, Mr. Pittman now retracts his stipulation. But, he concedes that in Texas any assault causing bodily injury of a public servant who is lawfully discharging a public duty a felony. Texas Penal Code 22.01(b)(1); Br. of Appellant at 38-40. In Washington, an assault of a police officer who is performing his or her official duties is a felony.

RCW 9A.36.031(1)(g). The State agrees that the Texas statute is broader, as it covers other instances of assault and other aggravators making a simple assault a felony. Because it is broader, the court must determine whether the Texas felony was factually comparable to Washington's third-degree assault statute.

Notably, Mr. Pittman entered a "Stipulations of Evidence and Judicial Confession" in his plea on this felony, and that plea includes his written agreement that he did "unlawfully, intentionally, knowingly and recklessly caused serious bodily injury to Officer Wade Boedeker, a public servant." CP 208. Mr. Pittman also affirmatively consented to the use of "affidavits, oral stipulations, written witness statements, *and any other documentary evidence for introduction into evidence as the testimony in support of the Judgement of the Court*." *Id*. (emphasis added). Taking him at his word, the State submits that the grand jury indictment supports the comparability analysis as it states Mr. Pittman "knowingly, or recklessly cause[d] serious bodily injury Officer Wade Boedeker by forcing Officer Wade Boedeker to the ground causing injury to his knee, and the defendant did then and there know that said Officer Wade Boedeker was a public servant, to wit: Madisonville Police Officer, and that the said Officer Wade Boedeker was then and there lawfully discharging an official duty, to-wit: attempting to detain defendant for a theft." CP 201. That

finding provides enough of a background, together with his stipulation, to establish that his conduct underlying the out-of-state third-degree assault conviction would have violated the comparable Washington third degree assault.

5. 1996 Texas forgery

Mr. Pittman again reneges on his stipulation. He now argues that because the State only submitted his Texas forgery judgment and sentence, that is not enough to prove the comparability of this offense. The State agrees the Texas statute is broader. Br. of Appellant at 41-43. Again, the record is not clear as to what documents the trial attorney for the defendant possessed and reviewed prior to sentencing. However, because Mr. Pittman and his attorney specifically stipulated[16] to this offense as being both equivalent to a Washington state felony and countable in his offender score, the State was not required to submit evidence of proof in the face of this written waiver.

[16] He also submitted memoranda to the Court arguing "Mr. Pittman's Texas conviction for forgery in 1996 is legally comparable to the class C felony of forgery in Washington state." Any error in this regard is invited, because defendant cannot establish that the forgery was not factually comparable because those documents are not in the record.

6. Possession of a controlled substance conviction.

Both Texas and Washington have many controlled substances that are listed in the various schedules and outside the schedules. Without knowing the nature of the drug involved it would be difficult to conduct a comparability analysis. However, as *Mr. Pittman argued to the trial court* in his Revised Memorandum of Authorities re: Offender Score:

> The charging document shows Mr. Pittman possessed less than 28 grams of cocaine. Cocaine is a schedule II controlled substance under Washington state law. RCW 69.50.206(b)(4) (Feb. 10, 1992). Therefore, Mr. Pittman's Texas conviction for possessing a dangerous drug in 1992 is legally comparable to the Washington state class C felony of possessing a controlled substance.

CP 153.

The above admission makes it apparent that Mr. Pittman had a copy of the charging document prior to sentencing, and reviewed that document, as well as his judgment and sentence regarding his conviction (by plea) for "possession of a controlled substance, namely: cocaine of less than twenty-eight grams" CP 251. However, on appeal, that charging document, possessed and reviewed by Mr. Pittman's attorney, is not included in the clerk's papers; only the judgment and sentence is provided.[17] In any event, he was convicted of possession of cocaine, a felony in either state.

[17] Which, again, raises the probability that the defendant possessed many more legal documents that were not filed with the court because his

E. THE STATE AGREES THAT THIS COURT SHOULD ORDER THE CRIMINAL FILING FEE TO BE STRICKEN PURSUANT TO *RAMIREZ*.

The court imposed the $200 criminal filing fee and $100 DNA collection fee. CP 327; RP 497. The defendant argues this Court should order the trial court to strike the imposition of the $200 filing fee, and the $100 DNA fee imposed at sentencing. The State agrees. In 2018, House Bill 1783 amended the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit courts from imposing the $200 filing fee on indigent defendants. Laws of 2018, ch. 269, § 17(2)(h). As of June 7, 2018, trial courts are prohibited from imposing the $200 criminal filing fee on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; Laws of 2018, pg. ii, "Effective Date of Laws."

In *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), our high Court addressed the 2018 amendments to RCW 43.43.754 and held that the amendment is applicable to cases pending on direct review and not final when the amendment was enacted. *Id.* at 747. In the present case, the defendant was sentenced on April 20, 2018, and was pending direct review at the time of the legislative amendments.

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stipulations eliminated the necessity to file these documents with the trial court.

Mr. Pittman has two previous adult felony convictions in Washington State in the years 2013 and 2014. CP 322. Therefore, the State presumptively collected a DNA sample from Mr. Pittman as a result of those convictions. Under HB 1783, the DNA collection fee is no longer mandatory if a DNA sample has been collected from a defendant based on a prior conviction. RCW 43.43.7541 now provides, in relevant part, "Every sentence imposed for a crime specified in RCW 43.43.754 [i.e., any felony] must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction." Laws of 2018, ch. 269, § 18.

Thus, this Court should order that the $200 court cost and the $100 DNA fee be stricken from judgment and sentence; this may be done without a resentencing. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (a ministerial correction does not require a defendant's presence).

V. CONCLUSION

This Court should deny the appeal, other than for the financial corrections.

Bradshaw and *Cleppe* reviewed the language and legislative history of the drug possession statute in determining that the legislature clearly intended it to be a strict liability crime. This Court should not accept the defendant's invitation to overrule our State Supreme Court.

Mr. Pittman fails to establish any prejudice resulting from the trial court's determination of his standard range. Any standard range calculation from 1 to 9+ would have resulted in his release on his date of sentencing. Any error the range calculation of his offender score was harmless.

Mr. Pittman's signed stipulation and agreement waives any argument on appeal that those felonies he specifically agreed were comparable are not comparable. Moreover, because of the agreement, the defendant's argument that there is no proof of factual comparability does not establish that the crimes stipulated to were not factually comparable. Because Mr. Pittman cannot show from *the record* that the offenses are factually different, he cannot prevail on his ineffective assistance of argument claim. *Yallup*, 3 Wn. App. 2d at 558-59. It is also clear that Mr. Pittman's attorney had additional documentation not included in the record of the trial court to enable him to determine which crimes were comparable. Additionally, as above, there is no prejudice inuring to Mr. Pittman even if the stipulation had not been made, he would not have been released earlier than the day he was actually sentenced.

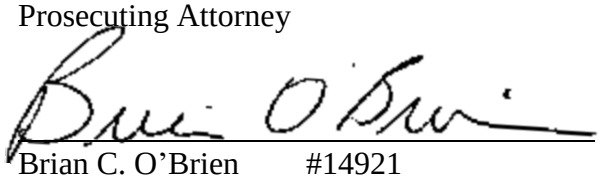
Finally, if any six of the felonies are countable in Mr. Pittman's offender score, his standard range remains unchanged. The trial court found Mr. Pittman's offender score to be 9 or a 10. If he "prevails" by eliminating

the use of 4 of his 6 now-challenged felony convictions, he is still a 6 for sentencing purposes, and the range remains the same.

This Court should affirm the judgment and sentence of the lower court, but order a ministerial correct to the judgment regarding the $200 court cost and the $100 DNA fee.

Dated this 21 day of May, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

ATTACHMENT A

FILED

APR 23 2018

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

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PC: 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON Plaintiff, v. LESLIE LEE PITTMAN WM 06/23/67 Defendant(s).	)	No. 16-1-03718-7 PA# 16-9-62953-0 RPT# CT III: 2016-00355247 RCW CT III: 69.50.4013(1)-F (#56640) UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY (ST)

Pursuant to CrR 4.2 (e) the parties set out the following:

1.4 PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY (RCW 9.94A.525):

	Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
1	TMVWOP-2	032614	NV	A	SPOKANE CO, WA	061214
2	PCS	061713	DRUG	A	SPOKANE CO, WA	061214
Δ-objection	EVADE ARREST (F)	021709		A	TRAVIS CO, TX	061509
objection	UNAUTH USE MV	021709		A	TRAVIS CO, TX	061509
3	CREDIT CARD ABUSE	081008		A	TRAVIS CO, TX	100108
Δ-objection	UNAUTH USE MV	102607		A	TRAVIS CO, TX	120507
4	ASSAULT 3	071799		A	MADISON CO, TX	061900
5	FORGERY	012396		A	MADISON CO, TX	061196
6	DANG DRUGS	021092	DRUG	A	TARRANT CO, TX	022592
7	THEFT OF PPTY	102890		A	TARRANT CO, TX	031591
8	FAIL STOP/RENDER AID	102890		A	TARRANT CO, TX	031591
Δ-objection	EVADE ARREST	101807	MISD.	A	TRAVIS CO, TX	102407
Δ-objection	POSS DANG DRUG	062707	MISD.	A	TRAVIS CO, TX	070307
Δ objection	POSS MARIJUANA	053007	MISD.	A	TRAVIS CO, TX	060607

*Court finds that the defendant is a 10 for sentencing purposes. See separate findings of fact and conclusion of law.

Attach. A-1

Δ-Objection EVADE ARREST	022505	MISD.	A	TRAVIS CO, TX	030305
Δ-Objection CRIM TRESPASS	022505	MISD.	A	TRAVIS CO, TX	030305
Δ-Objection RESIST ARREST	ARREST 072799	MISD.	A	TARRANT CO, TX	012000

( ) Prior convictions counted as one offense in determining offender score (RCW 9.94A.525(5)): _____

1.4(a) This statement of Prosecutor's Understanding of Defendant's Criminal History is based upon present information known to the Prosecutor and does not limit the use of additional criminal history if later ascertained.

1.5 Defendant's understanding and agreement that his/her criminal conviction history is set forth above in this document. Defendant affirmatively agrees that the State has proven, by a preponderance of the evidence, defendant's prior convictions and stipulates, without objection, by his/her signature below, unless a specific objection is otherwise stated in writing within this document – UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY, each of the listed criminal convictions contained within this document count in the computation of the offender score and sentencing range and that any out-of-state or foreign conviction(s) is the equivalent of a Washington State criminal felony offense and conviction for the purposes of computation of the resultant offender score and sentencing range. The defendant further stipulates and agrees he/she has read or has had the contents of the document read to him/her and he/she understands and agrees with the entirety of the contents of this document. (DEFENDANT'S INITIALS LLP).

( ) The defendant committed the current offense while on community placement/community custody at the time of the offense. RCW 9.94A.525

Date: 4-20-18

LESLIE LEE PITTMAN
Defendant

Date: 4/20/18

Michael Vander Giessen
Lawyer for Defendant

45288
WSBA #

Date: 4/20/18

PRESTON U. MCCOLLAM
Deputy Prosecuting Attorney

46549
WSBA #

Attach. A-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. LESLIE PITTMAN, Appellant.	NO. 36034-2-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 21, 2019, I e-mailed a copy of the Brief of Respondent Response Brief in this matter, pursuant to the parties' agreement, to:

Kate Huber
wapofficemail@washapp.org

5/21/2019 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

May 21, 2019 - 10:54 AM

Transmittal Information

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Superior Court Case Number:	16-1-03718-7

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